Study L-750 October 4, 2013

Memorandum 2013-45

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Tribal Issues

In June 2013, the Commission released its Tentative Recommendation on *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (hereafter, "Tentative Recommendation").[1] The Commission received a number of comment letters on the Tentative Recommendation, which are addressed in Memorandum 2013-44 and its supplements.

In the Tentative Recommendation, the Commission specifically requested comment on the treatment of federally recognized Indian Tribes under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"). This memorandum discusses two comment letters that focus on tribal issues. They are attached in the Exhibit, as follows:

The staff appreciates the feedback from both of these organizations. It is very helpful to have input from organizations with expertise in this specialized area of law. In particular, the staff wants to express its thanks to the Judicial Council's Probate and Mental Health Advisory Committee and the Tribal Court/State Court Forum ("Advisory Committee and Forum") for their work in thoroughly analyzing the application of UAGPPJA to California tribes and developing proposed revisions to address issues that would arise from that application.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

Unless otherwise indicated, all statutory references in this memorandum are to the Probate Code.

GENERAL COMMENTS

Advisory Committee and Forum

In their letter, the Advisory Committee and Forum observe that UAGPPJA seems to assume that "every 'state' has a territory that is unique and exclusive."[2] They explain why this assumption does not hold for tribes:

- Tribal jurisdiction is not limited by clearly delineated geographic boundaries and can extend to tribal members who are not physically present on tribal lands.[3]
- Even if tribal jurisdiction were limited to tribal lands, those lands are located *within* a state. A California tribe member living on tribal land is also living in California. Thus, under UAGPPJA, both the tribe and the state could be the tribe member's "home state."[4]
- Under Public Law 280, California tribal courts and California state courts generally have *concurrent* jurisdiction over civil matters, including conservatorships. However, California courts do *not* have jurisdiction to authorize "the alienation, encumbrance, or taxation or any real or personal property … belonging to any Indian or any Indian tribe."[5]

For those reasons, the application of UAGPPJA to tribes whose lands are located within California would likely create confusion.

The Advisory Committee and Forum suggest a number of specific changes to the proposed law to address those issues.[6] The details of their proposed revisions are discussed later in the memorandum.

Northern California Tribal Court Coalition

The Northern California Tribal Court Coalition ("NCTCC") supports the proposal of the Advisory Committee and Forum.[7] In addition, the NCTCC responds to general concerns about tribal due process protections, noting:

2. Exhibit p. 2.
3. *Id*.
4. *Id*.
5. *Id*. at 5-6.
6. *Id*. at 1-2.
7. *Id*. at 13.

> Both of the tribes in NCTCC that currently issue adult guardianship orders have due process protections built into their respective codes. In general, tribes have a strong interest in providing a fair forum for actions involving their members, since both the tribal governments responsible for enacting laws and the tribal courts responsible for applying them must answer to the tribal membership at election time. While concerns about limited due process in tribal courts are not new, they are not well-founded; a review in 2000 of all individual rights claims in reported tribal court decisions from 1986-1998 found such allegations to be "grossly overstated, if not entirely misplaced."[8]

Regarding the general issue of whether to include tribes in the definition of "state," the NCTCC notes that only two of the 38 states that have adopted UAGPPJA have chosen to exclude tribes from the definition of "state." Further, the NCTCC notes that California has included tribes in several previous enactments of uniform laws without systemic problems arising from those inclusions.[9]

TRIBAL POPULATIONS AND COURTS IN CALIFORNIA

As background for its comments, the Advisory Committee and Forum provide a summary of the tribal populations and courts in California. In short, California is home to many tribe members and includes territory for a number of federally-recognized tribes:

> There are currently 110 federally recognized Indian tribes in California and 78 entities petitioning for recognition. … As sovereigns, tribes have legal jurisdiction over both their citizens and their lands.
>
> … In 2012, 39 of 110 federally recognized California tribes (36 percent) either have a tribal court or access to a tribal court through an inter-tribal court coalition. This is a significant increase from 2002, when only 10 California tribes reported having a tribal court.
>
> At least eight of these court systems, including the Intertribal Court of Southern California, report dealing with cases involving adult guardianship/conservatorship and protection of vulnerable adults. These courts reported that they issue orders concerning their tribal members who live both on and off reservation. They report that to date their orders have been recognized by institutions and agencies both on and off the reservation. In addition, the Northern California Tribal Courts Coalition (NCTCC) reports that

8. *Id*.
9. *Id*.

protection of vulnerable adults is a priority area that the NCTCC courts have identified for expansion of their services.[10]

Given the unique jurisdictional posture of the tribes, the Advisory Committee and Forum propose revising the proposed law to clarify the treatment of tribes.

GENERAL DRAFTING APPROACH

The Advisory Committee and Forum have recommended changes to the proposed law to address the special jurisdictional relationship between California tribes and California courts. Their letter provides draft language to implement their proposed changes. Their provisions are organized as a new Article 6 that would be added to the end of the proposed law.[11] Throughout the remainder of the memorandum, this will be referred to as "proposed Article 6."

Before discussing the substance of proposed Article 6, the staff would like to briefly discuss the general drafting approach used by the Advisory Committee and Forum.

Proposed Article 6 is structured as a set of "modifications" to specified provisions of the proposed law.[12] In some cases, the modifications merely substitute one term for another.[13] In other cases, the proposed language states a rule of law that would substitute for a particular UAGPPJA provision.[14] In another case, the proposed language gives instructions on how to read a UAGPPJA provision under differing circumstances.[15]

Under that drafting approach, the law governing California tribes would be determined by reading each main provision of the proposed law together with the Article 6 provision that modifies it.

While there is nothing substantively wrong with the drafting approach described above, it is quite different from the Commission's traditional drafting style, for the reasons described below:

- Proposed Article 6 relies heavily on cross-references. The Commission tries to minimize the use of cross-references where possible, to simplify the presentation of the law and to avoid

10. *Id.* at 4-5.
11. *Id.* at 7-12.
12. For example, proposed Section 2043 sets out modifications to proposed Sections 1981-1986. See Exhibit p. 8.
13. See, e.g., Exhibit p. 8 (proposed Section 2043(d)).
14. See, e.g., Exhibit p. 9 (proposed Section 2044(e)).
15. See, e.g., Exhibit p. 9 (proposed Section 2044(c)).

maintenance problems that can arise if the law is later amended (e.g., a section might be renumbered without revising the provision that references it).

- In cross-referring to other provisions of the proposed law, proposed Article 6 makes extensive use of paraphrasing. The Commission does not use paraphrasing, because it can introduce uncertainty as to whether the paraphrase is evidence of legislative intent as to the meaning of the paraphrased provision.

The staff recommends that any changes that the Commission decides to include in the proposed law be drafted using a more traditional drafting approach. Specifically, any necessary adjustments to the proposed law would be made directly in the provisions that require adjustment, rather than by means of a separately stated modification.

MAIN SUBSTANTIVE CHANGES

After analyzing proposed Article 6, the staff believes its substance can be boiled down to four main changes:

- Provide that a California tribe is a "state" under the law.[16]
- With regard to a member of a California tribe, establish clear rules for when California and the tribe are the "home state" or " significant-connection state," so as to avoid any overlap in jurisdiction.[17]
- Expressly permit a "partial" transfer, of some but not all conservator powers, from a California court to a tribal court (or vice versa).[18]
- Modify the registration provision to make clear that registration of a California tribal conservatorship order is effective, notwithstanding the fact that the conservatee lives in California (recall that, under proposed Section 2014(b), a registered order is not effective when a conservatee resides in California).

These four main substantive changes are discussed more fully below.

The discussion that follows does not address every detail of proposed Article 6. The staff believes it would be best for the Commission to first consider the main objectives of the proposal and decide whether to address them in the

16. *Id.* at 8-9 (Proposed Section 2044).
17. *Id.* at 8-9 (Proposed Section 2044).
18. *Id.* at 9, 10 (Proposed Sections 2044(e), 2045(a)(2), (b)(2)).

proposed law. Once those general decisions have been made, we can look more closely at the implementing details.

It is worth noting that this area of the law is complex and is largely new to the staff. If the analysis in this memorandum has misstated or omitted any critical points, we invite further input from the subject matter experts.

TRIBES AS "STATES"

Generally

In the Tentative Recommendation, the Commission requested comment on "whether to include a federally recognized Indian tribe in the definition of 'State' and, if not, what alternative treatment would be appropriate."[19]

Neither the Advisory Committee and Forum, nor the NCTCC directly address the question posed in the Tentative Recommendation. However, both groups clearly support the treatment of California tribes as "states" (subject to modifications of UAGPPJA to address the unique geographical and jurisdictional relationship between California and the tribes).[20]

Unless there is some fundamental distinction between California tribes and non-California tribes that would justify different treatment with regard to their status as "states," it would seem that all tribes should be treated as states for the purposes of UAGPPJA. **The staff does not see such a distinction and recommends that all federally recognized tribes be treated as states (subject to the special rules required for California tribes).**

"California Tribe" as "Another State"

Throughout proposed Article 6, the Advisory Committee and Forum make numerous modifications to indicate that the words "another state" or "other state" refer to a "California tribe" (or, similarly, that "court of another state" refers to a "tribal court of a California tribe").[21] The staff agrees that, due to the geographical overlap between the territory of California and a California tribe, the terminology in UAGPPJA could potentially be confusing. It would be helpful to make such clarifications.

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19. Tentative Recommendation at 42 (Proposed Section 1982 Note).
20. *Id.* at 7 (Proposed Section 2042(a)).
21. *See* Exhibit pp. 7-11 (Proposed Sections 2042(a), (b); 2043(d), (e); 2044(d), (f), (g), (h), (i); 2045(a)(1), (b)(1); 2046(a)(1), (a)(3), (b)(1), (b)(3)).

Tribes that Exercise Conservatorship Jurisdiction

While proposed Article 6 would generally recognize a tribal court as a court of another state, it only extends such recognition to a tribal court that exercises conservatorship jurisdiction.[22] For the most part, Articles 2 (jurisdiction), 3 (transfer), and 4 (registration) of the proposed law would only apply to tribal courts that exercise conservatorship jurisdiction. That makes sense. If a tribal court does not exercise conservatorship jurisdiction, there is no need to determine the scope of its jurisdiction. Nor will there be any tribal conservatorships to transfer or register.

In fact, applying UAGPPJA's jurisdictional rules to a tribal court that does not exercise conservatorship jurisdiction could create needless complications and could lead to illogical results. For example, if a person lives within the jurisdictional territory of a tribe whose court does not exercise conservatorship jurisdiction, the tribe would nonetheless be the person's "home state" for the purposes of UAGPPJA. That would complicate the process of obtaining a conservatorship, as California's courts would need to follow the procedure for obtaining jurisdiction as a " significant-connection state."

JURISDICTION

As "states" (see discussion above), California tribes would be subject to Article 2 of the proposed law,[23] governing conservatorship jurisdiction.

However, those provisions would not be a good fit for determining whether California or a California tribe has jurisdiction over a proposed conservatee who is a member of a California tribe. The difficulty in applying UAGPPJA to that scenario results from the fact that a California tribe member may live within the territory of both the tribe and California simultaneously.

Therefore, the Advisory Committee and Forum propose modifications to Article 2 that address the territorial overlap between California and California tribes.[24]

22. *Id.* (Proposed Section 2041(d) ("tribal court" defined)).
23. See Tentative Recommendation pp. 46-58 (Proposed Sections 1991-1999).
24. See Exhibit pp. 8-10 (Proposed Section 2044).

"Home State" v. " Significant-Connection State"

The UAGPPJA provisions governing conservatorship jurisdiction turn on whether a state is the proposed conservatee's "home state," as opposed to a " significant-connection state."[25] Those terms are defined, for the purposes of the proposed law, as follows:

> (2) "Home state" means the state in which the proposed conservatee was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a conservatorship order, or, if none, the state in which the proposed conservatee was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.
>
> (3) "Significant-connection state" means a state, other than the home state, with which a proposed conservatee has a significant connection other than mere physical presence and in which substantial evidence concerning the proposed conservatee is available.[26]

As noted above, the distinction between a home state and a significant-connection state breaks down when applied to a member of a California tribe who is living in California. Under the definition above, if a tribal member is living on tribal land, the member will have two "home states." UAGPPJA does not address that possibility, as it seems to be based on an assumption that all states have non-overlapping territory.

Not only is the possibility of two home states not addressed in UAGPPJA, but this possibility seems incompatible with UAGPPJA, which provides that only one entity will have primary jurisdiction over a conservatorship at any time.[27] (By contrast, the fact that a California tribe member would have two "home states" essentially parallels the general jurisdictional overlap under Public Law 280, where the tribe and California have concurrent civil jurisdiction.)

In order to address that issue, proposed Article 6 would provide separate definitions of "home state" and " significant-connection state" for a member of a California tribe living in California. Those definitions would effectively establish non-overlapping territory for the purposes of determining whether California or the tribe is the home state:

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25. See Tentative Recommendation pp. 49-51 (Proposed Section 1993).
26. See *id.* at 47 (Proposed Section 1991(a)(2)-(3)).
27. See *id.* at 53 (Proposed Section 1995).

- If a tribe member lives on tribal land or in a California county that contains tribal land for the requisite period of time, the tribe would be the home state and California would be a significant-connection state.
- If a tribe member lives anywhere else in California, California would be the home state and the tribe would be a significant-connection state.[28]

With those modifications, the general UAGPPJA jurisdictional rules would apply (i.e., the home state would have default jurisdiction, subject to specified exceptions).

Proposed Article 6 has obvious advantages. It would provide clear rules for determining which court, state or tribal, has primary jurisdiction over a tribe member's conservatorship. There would be no situations where primary jurisdiction would overlap. This would provide clearer guidance to parties and would eliminate the possibility of "dueling" conservatorships being established in both state and tribal courts.

However, the staff has some concerns about the proposed jurisdictional rules, which are discussed below.

Solution Dependent on Tribal Adoption

California has no authority to modify a tribe's jurisdiction. Consequently, in order for the proposed jurisdictional rules to have their intended effect, California tribes would need to enact equivalent law. A tribe that has not adopted law equivalent to proposed Article 6 would continue to have the same jurisdiction it has under existing law, including jurisdiction over tribe members who live outside of tribal lands. The possibility of dueling conservatorships would still exist, complicated slightly by the fact that state and tribal law on jurisdiction would be out of sync.

Procedural Complication

Under existing law, it appears that California tribe members are free to choose whether to petition for a conservatorship in state or tribal court. Under proposed Article 6 (if adopted by both state and tribe), that choice could entail additional procedural burdens.

28. See Exhibit pp. 8-9 (Proposed Section 2044(a)(1)-(2)).

A petition could still be filed without complication in the person's "home state," because that state would have default jurisdiction under UAGPPJA.[29] So, for example, a person who lives on tribal land could file a petition in tribal court without any procedural complication, because the tribe would be the person's home state under proposed Article 6.

But a tribe member who wants to file a petition in the " significant-connection state" would face an additional procedural step. The tribe member would need to petition the court in the home state to "decline to exercise" its jurisdiction on the grounds that the significant-connection state is the "more appropriate forum."[30] So, for example, if a tribe member living on tribal land wanted to file in state court, the tribal court would need to agree that the state is the more appropriate forum. That additional step is not required under existing law.

Recall that an important rationale of UAGPPJA is to reduce the procedural cost and difficulty of dealing with inter-jurisdictional conservatorship matters. It is not clear that proposed Article 6 would be an improvement in that regard, as compared to the existing concurrent jurisdiction system.

Diminished Member Choice

Under UAGPPJA, parties have some flexibility to choose a forum other than their home state, if the court of the home state finds that a significant-connection state is the more appropriate forum. However, there is no guarantee that the court will make that decision. If it does not, then the default jurisdiction provided by UAGPPJA would control.

This could disadvantage California tribe members, who are currently free to choose between tribal and state courts. Suppose that a tribe member who does *not* reside on tribal land has strong reasons to prefer that the tribe exercise jurisdiction over a proposed conservatorship. Despite those reasons, the California court does not agree that the tribe is the better forum. The tribe member would then be barred from choosing tribal jurisdiction (an option that the tribe member has under existing law). Or conversely, suppose that a tribe member living on tribal lands would prefer to be conserved in California court. That choice, which could be freely made under existing law, would be subject to tribal court approval under proposed Article 6.

29. See Tentative Recommendation p. 49 (Proposed Section 1993(a)).
30. See *id.* at 54 (Proposed Section 1996).

Broader Implications

While there are advantages to the jurisdiction allocation rules in proposed Article 6, the Commission should perhaps consider another alternative: leave existing law on tribal/state jurisdiction unchanged (i.e., UAGPPJA's jurisdiction provisions would be inapplicable to a California tribe member living in California).

The question of how to allocate the concurrent civil jurisdiction of states and tribes is important and complex. It involves the delicate question of how to reconcile tribal sovereignty, federal law, and state law. Other jurisdictions have spent considerable time wrestling with this issue. For example, a case of dueling jurisdiction in Wisconsin led to years of litigation, followed by negotiation and rulemaking involving officials of both state and tribal courts. Those efforts culminated in the approval of multi-factor protocols, which are used by combined tribal and state judge panels to allocate jurisdiction where both tribe and state assert their concurrent jurisdiction.[31] More recently, Wisconsin enacted a statute granting a state court discretion to transfer a case to tribal court, where there is concurrent tribal/state jurisdiction and specified factors support the transfer:

> Discretionary transfer. When a civil action is brought in the circuit court of any county of this state, and when, under the laws of the United States, a tribal court has concurrent jurisdiction of the matter in controversy, the circuit court may, on its own motion or the motion of any party and after notice and hearing on the record on the issue of the transfer, cause such action to be transferred to the tribal court. The circuit court must first make a threshold determination that concurrent jurisdiction exists. If concurrent jurisdiction is found to exist, unless all parties stipulate to the transfer, in the exercise of its discretion the circuit court shall consider all relevant factors, including but not limited to:
>
> (a) Whether issues in the action require interpretation of the tribe's laws, including the tribe's constitution, statutes, bylaws, ordinances, resolutions, or case law.
>
> (b) Whether the action involves traditional or cultural matters of the tribe.
>
> (c) Whether the action is one in which the tribe is a party, or whether tribal sovereignty, jurisdiction, or territory is an issue in the action.
>
> (d) The tribal membership status of the parties.

31. B. Hanan & W. Levit, Jr., *Wisconsin's Experience in Allocating Jurisdiction Between State and Tribal Courts*, 45 Court Review 20 (2009).

(e) Where the claim arises.

(f) Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute.

(g) The timing of any motion to transfer, taking into account the parties' and court's expenditure of time and resources, and compliance with any applicable provisions of the circuit court's scheduling orders.

(h) The court in which the action can be decided most expeditiously.

(i) The institutional and administrative interests of each court.

(j) The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure, including where the action will be heard and decided most promptly.

(k) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.[32]

In Washington, the courts have adopted a rule on the allocation of concurrent tribal/state jurisdiction:

> Indian Tribal Court; Concurrent Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.[33]

The staff is not suggesting that the approaches discussed above are superior to proposed Article 6. But they are clearly quite different. Those approaches do not establish default rules that would limit tribal or state jurisdiction (subject to the assent of the other jurisdiction). And those approaches involve the consideration of factors beyond just the parties' place of residence.

At this point in the study of UAGPPJA, we may not have enough time and resources to fully evaluate whether the jurisdictional rules in proposed Article 6 are the best way to allocate tribal and state concurrent jurisdiction. The Advisory Committee and Forum have studied the matter, with input from both tribes and

32. Wis. Stat. § 801.54(2).
33. Wash. Ct. R. 82.5(b).

the state courts, and their conclusions deserve respect and some deference. Nonetheless, the staff remains uneasy about making a decision on a matter of this importance (which could set a precedent with regard to concurrent state/tribal civil jurisdiction generally) without more thorough review than may be practicable at this time.

TRANSFER OF CONSERVATORSHIP

As "states" (see discussion above), California tribes would be subject to Article 3 of the proposed law,[34] allowing for the expedited transfer of a conservatorship from one jurisdiction to another.

However, the Advisory Committee and Forum suggest some minor adjustments to the transfer provisions, to accommodate the special jurisdictional relationship between California and California tribes.[35] Those adjustments are discussed below.

Partial Transfer to Tribe

As discussed above, Public Law 280 provides that the State of California and California tribes have concurrent jurisdiction over a conservatorship involving a California tribe member. However, there is one important exception: California courts do not have jurisdiction to authorize "the alienation, encumbrance, or taxation of any real or personal property including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."[36]

As the Advisory Committee and Forum explain, this exception imposes a potential constraint on a California court's ability to supervise a conservator's property-related powers:

> This means that state courts may be limited in their ability to protect important assets of tribal members. For instance, a state court has no jurisdiction to issue an order concerning the use or occupation of tribal lands or other real or personal property held in trust by the federal government for the benefit of tribes or individual Indians.[37]

34. See Tentative Recommendation pp. 58-64 (Proposed Sections 2001-2002).
35. See Exhibit p. 10 (Proposed Section 2045)
36. See *id.* at 5.
37. *Id.*

Consequently, there are situations where it would make sense to have a conservatorship established in both a California court and a California tribal court. For example, if a California court establishes a conservatorship of the person and estate for a California tribe member, it might be necessary to also establish a complementary conservatorship in the tribal court, for the narrow purpose of addressing the property matters that are not within the state court's jurisdiction.

Proposed Article 6 would address that problem by modifying the UAGPPJA transfer process. Specifically, proposed Article 6 would authorize a partial transfer between California and a California tribe, where some of a conservator's powers are transferred while others are reserved by the transferring court. For example, in the scenario described above, a California court that does not have jurisdiction over certain property could transfer jurisdiction over just those matters to the tribal court. This would obviate the cost and burden of creating a separate tribal conservatorship *de novo*.

To implement that idea, proposed Article 6 would modify proposed Section 2001 (which provides the process for transferring a California conservatorship to another jurisdiction) to allow for partial transfer as follows:

> A petitioner may request, and the court of this state may order, provisionally and finally, transfer of all or less than all of the authority or powers of the conservator to the tribal court of an adopting California tribe. In the event of a transfer of less than all authority or powers of the conservator, the court of a transferring state shall continue supervision of the administration of the functions or powers not transferred.[38]

If that approach is taken, proposed Article 6 would also modify proposed Section 1995 to allow for concurrent jurisdiction with regard to a partially transferred conservatorship.[39]

The general idea of permitting a partial transfer of a conservatorship from California to a California tribe seems reasonable and beneficial, for the reasons discussed above. **If the Commission approves of the concept, the staff would draft implementing language for consideration at the December meeting.**

38. *Id.* at 10 (Proposed Section 2045(a)(2)).
39. *Id.* at 9 (Proposed Section 2044(e)).

Partial Transfer from Tribe

Proposed Article 6 would also authorize the transfer of a conservatorship *from* a California tribe to California, by modifying proposed Section 2002 (which provides the process for accepting the transfer of a conservatorship from another jurisdiction):

> If the proposed transfer is from the tribal court of an adopting California tribe and is of less than all authority or powers of the conservator, the court shall communicate with the tribal court under Section 1984 before it makes an order striking or modifying the powers of the conservator that would change the division of authority or powers made by the order of the tribal court.[40]

This presents the same general policy issue that is discussed above. **Again, if the Commission approves of the concept, the staff would draft implementing language for consideration at the December meeting.**

Beyond that general issue, proposed Article 6 includes one additional point that requires discussion: if there is a petition to transfer only part of the powers established under a tribal conservatorship, the California court would need to "communicate" with the tribal court before striking or modifying the transferred powers in a way that would "change the division of authority or powers made by the order of the tribal court." The staff is not sure of the purpose or effect of that rule. There are two main points on which additional information would be helpful:

- What does it mean for a California court to "change the division of authority or powers made by the order of the tribal court"? Presumably a California court could not grant itself powers that were reserved to the tribe.
- What is the purpose of requiring that the California court "communicate" with the tribe before modifying the transferred powers? Should the proposed law also require communication between the courts when a conservatorship is partially transferred *to* a tribe?

REGISTRATION OF TRIBAL ORDERS

As "states" (see discussion above), California tribes would be subject to Article 4 of the proposed law,[41] allowing for the registration another state's

40. *Id.* at 10 (Proposed Section 2045(b)(2)).
41. Tentative Recommendation pp. 64-67 (Proposed Sections 2011-2016).

conservatorship order in California (for the purpose of requiring recognition of the powers granted in the registered order, subject to any limitations in California law).

However, proposed Article 6 includes some minor adjustments to the registration provisions, to accommodate the special relationship between California and California tribes.[42] Those adjustments are discussed below.

Effect of Registered Orders on California Residents

Under the proposed law, a registered order of another state is only effective "while the conservatee resides out of this state."[43] In other words, registration cannot be used if the conservatee resides in California.

That rule would be a problem for a California tribal conservatee who resides in California (which could include a person who lives on tribal land). As the Advisory Committee and Forum explain:

> [T]he registration process contemplated in the legislation (CCJA, Art. 4, §§ 2011–2016[1]) is questionable in cases involving California tribes and the State of California because registration is unavailable for conservatees present within the state where appointment orders are to be registered, and any member of a California tribe present in tribal areas is also present within California.[44]

Proposed Article 6 would address that problem by providing that a member of a tribe who resides in a county that contains tribal land would be considered a nonresident of California for the purposes of the residency limitation in Section 2014.[45]

The staff generally agrees that the residency limitations in proposed Section 2014 should not apply to a conservatorship for a member of a California tribe. The Tentative Recommendation explains the purpose of the residency limitation:

> The Commission believes, however, that if a conservator-conservatee relationship is relocated to California, it should be officially transferred to California and subjected to the safeguards of the transfer process. For that reason, the registration of an out-of-state conservatorship in California should only be effective while

42. See Exhibit pp. 10-11 (Proposed Section 2046).
43. Tentative Recommendation p. 66 (Proposed Section 2014(a)-(b)).
44. Exhibit p. 2.
45. *Id.* at 11 (Proposed Section 2046(b)(2)).

> the conservatee resides in another jurisdiction. If the conservatee moves to California, the conservator should no longer be able to take action in California pursuant to the registration, and should have to seek a transfer of the court proceeding to California.

When a conservatorship relocates from another state to California, California has a strong interest in assuming jurisdiction over the conservatorship. California's courts could then ensure that the law and policy of California is applied to protect and benefit its new citizen. Conversely, the relocated conservatee's former state no longer has a strong interest in asserting jurisdiction over its former citizen.

The situation with a California tribe is different. The fact that a tribe member lives in California is not reason to transfer jurisdiction from the tribe to the state. It is entirely proper for a tribe to exercise jurisdiction over its members who live in California. Consequently, there is no reason why California should limit its recognition of tribal orders.

Note, however, that proposed Article 6 would only provide an exemption from the residency limitation to a tribe member "who resides in a county within California in which the tribe has tribal land."[46] The staff believes that limitation to be overbroad. Under proposed Article 6, a tribe may still have jurisdiction over members who do not live on or near tribal lands. In such cases, there seems to be no reason to limit the effect of registration.

Good Faith Reliance on Registration

Proposed Section 2015 provides liability protection to third parties who rely in good faith on a registered conservatorship order. For that protection to apply, certain conditions must be satisfied, including the following:

> (3) The conservator presents to the third person a form approved by the Judicial Council, in which the conservator attests that the conservatee does not reside in this state and the conservator promises to promptly notify the third person if the conservatee becomes a resident of this state. The form shall also prominently state that the registration is effective only while the conservatee resides in another jurisdiction and does not authorize the conservator to take any action while the conservatee is residing in this state.

46. *Id.*

(4) The third person has not received any actual notice that the conservatee is residing in this state.[47]

If the Commission decides that the residency limitation should not apply to California tribal conservatorship orders, the requirements set out above should not apply to such orders. It would also be helpful if the Judicial Council were to prepare a separate form for registration of a California tribal conservatorship, to make clear that it is not subject to the residency limitation.

Recordation

Proposed Section 2016 provides that a registered conservatorship order can be recorded in the county recorder's office. This could be helpful in establishing clear title if a conservator is involved in a real property transaction.

Proposed Article 6 would provide that a California tribal conservatorship order can be recorded under Section 2016.[48] **The staff does not believe that the proposed language will be necessary if it is made clear that California tribes are "states" for the purposes of UAGPPJA**.

Proposed Article 6 also authorizes a county recorder of a county that contains tribal land to "record registrations of California state court appointment orders in that tribe's tribal court." The staff has two questions about that proposal:

(1) Why should the county recorder, rather than the conservator, be the one who submits California appointment orders to the tribal court?

(2) Does California have authority to authorize recordation in tribal court? The question of whether documents can be lodged in a tribal court would seem to be a question to be addressed by tribal law.

The staff invites input on those issues.

CONCLUSION

The purpose of this memorandum is to present the Advisory Committee and Forum's proposal, identify its main substantive objectives, and give the Commission an opportunity to decide whether, in general, it wishes to address those matters in the proposed law.

47. Tentative Recommendation p. 67 (Proposed Section 2015(a)(3)-(4)).
48. Exhibit p. 11 (Proposed Section 2046(c)(1)).

If the Commission wishes to do so, the staff would prepare implementing language, using the Commission's preferred drafting style, and present it for consideration at the December 2013 meeting.

The staff believes that the Advisory Committee and Forum have identified key issues that should be resolved if the proposed law is applied to California tribes. **The staff recommends that the Commission attempt to resolve those issues, along the general lines discussed above.** If the Commission agrees, we will revisit the matter in December.

Respectfully submitted,

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MEMORANDUM

Date
August 22, 2013

Action Requested
Please review

To
California Law Revision Commission

Deadline
N/A

From
Judicial Council of California's
Probate and Mental Health Advisory Committee,
Hon. Mitchell L. Beckloff, Chair; and

California Tribal Court/State Court Forum,
Hon. Richard C. Blake, Cochair, and
Hon. Dennis M. Perluss, Cochair

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Subject
Comment on Tentative Recommendation of the California Law Revision Commission for Adoption in California of a Modified Version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The Judicial Council of California's Probate and Mental Health Advisory Committee (advisory committee) and the California Tribal Court/State Court Forum (forum) submit this comment for your consideration in connection with the California Law Review Commission's (Commission) tentative recommendation for adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in California as legislation that would be called the California Conservatorship Jurisdiction Act (CCJA).

The advisory committee and the forum recommend modification of the CCJA in two respects. This memorandum addresses the first modification, a joint recommendation of both the advisory committee and the forum, would add a new Article 6 to the Commission's recommended

legislation, consisting of Probate Code sections 2041–2046. Article 6 would modify the application of the CCJA to California state courts and California Indian tribal courts concerning conservatorships of members of California tribes.

Proposed Article 6

The current draft of the CCJA would treat tribal courts of all federally-recognized Indian tribes—both inside and outside California—as courts of sister states. The proposal assumes that every "state" has a territory that is unique and exclusive. Under the proposed act, presumptive "home state" jurisdiction is based upon an individual's physical presence in that state's territory for a certain period of time. The proposal presumes that an individual can have only one "home state" at a time, and that he or she cannot be present in two "states" at the same time. The draft does not address the situation in which one "state" is contained within another "state," or in which one of the "states" does not have a territory (i.e., that a federally-recognized Indian tribe does not have a reservation or any other tribal area or tribally-owned or -controlled land).

The "home state" analysis in the proposed CCJA provisions is not sufficient to address jurisdictional issues between California state and tribal courts. The proposed law does not determine, define, or specify what geographic area is within a tribal "state's" boundaries. Because California tribal areas, however defined, are located within the state of California, a conservatee or proposed conservatee who is physically present in tribal areas could have two "home states" simultaneously for the purposes of CCJA's jurisdictional analysis. Additionally, the registration process contemplated in the legislation (CCJA, Art. 4, §§ 2011–2016[1]) is questionable in cases involving California tribes and the State of California because registration is unavailable for conservatees present within the state where appointment orders are to be registered, and any member of a California tribe present in tribal areas is also present within California. Finally, tribal court jurisdiction may extend to tribal members who are not physically present on tribal lands. Tribes provide services to and may exercise jurisdiction over their members living outside their lands.

Nothing in the Commission's draft of the CCJA would address these unique jurisdictional issues. That failure could lead to uncertainty and unnecessary jurisdictional confusion and conflicts between state courts and tribal courts in this state. These jurisdictional issues affecting conservatorships subject to the proposed CCJA involving California tribes and California state courts are complicated by California's status as a "Public Law 280" state, in which civil jurisdiction of state courts is extended to some matters involving individual Indians on tribal lands, but is merely concurrent with rather than superior to tribal court civil jurisdiction in those matters. Other parts of state court civil jurisdiction are not extended to Indian tribal areas by Public Law 280, specifically, direct jurisdiction over tribes, internal tribal matters, and property owned, controlled, or held in trust for tribes or tribal members.

[1] Unless otherwise specified, all references to code sections are to current or proposed sections of the Probate Code.

Proposal

The forum and the advisory committee recommend that proposed Article 6 be added to the CCJA. It would apply only to interactions between California tribal and state courts with respect to the subject matter of the CCJA and the UAGPPJA generally. It would not apply to or affect interactions between California state courts and other state courts or tribal courts in other states, or California tribal courts and state or tribal courts outside California. The format of Article 6 would adhere to the CCJA, in that its provisions identify which portions of the latter law would and would not apply and, as to those portions that do apply, would specify any modifications in their application. Key features of proposed Article 6 are:

- General—generally the provisions of the CCJA concerning the types of conservatorships covered and allocation of jurisdiction and cooperation and communication between courts would apply to California tribal courts whether or not the tribes adopt the UAGGJA, the CCJA, similar provisions, or Article 6 as stand-alone legislation.

- Jurisdiction—with respect to the courts of tribes with lands in California, the "home state" analysis under the CCJA would be modified to recognize the tribe as a "home state" whenever a proposed conservatee is a tribal member who is present in a county where the tribe has tribal lands, whether or not he or she is present on those lands. Tribal lands are defined in Article 6 by reference to the definition of "Indian Country" in federal law. In these cases, California would be a "significant connection" state. For tribal members who live outside of counties where the tribe has tribal lands, the tribe would be a "significant connection state" and California would be the presumed "home state." This jurisdictional scheme would apply whether or not the tribe in question had adopted CCJA or Article 6.

- Registration—whether or not they adopt CCJA or Article 6, California tribes would be able to register conservatorship orders of their courts coming within the scope of CCJA in California state courts of appropriate counties. Registration would confer the authority of the conservator appointed in the tribal court to act in the receiving jurisdiction (California) and to exercise all powers granted in the appointing jurisdiction (tribal court) that are not prohibited under California state law. State courts could register appointment orders in tribal courts of tribes that adopt the CCJA, the UAGPPJA, or Article 6. This limitation of registration to courts of states that have adopted the CCJA comes from that law itself, not from any provision of Article 6. That article would modify another feature of the uniform law concerning registration. Under the CCJA, a conservator may not register a court's order appointing a conservator in another state if the conservatee is presently located in the other state. This prohibition would not apply to registration of California tribal court orders in California state courts even though the conservatees are present within California as well as within a tribe's tribal land.

- Transfer—Under the CCJA and the UAGPPJA generally, in order to transfer proceedings between jurisdictions, both jurisdictions must have enacted the UAGPPJA or state equivalent. Article 6 would apply this equally to California tribes. In order to take advantage of the transfer provisions, a tribe would have to adopt some form of law equivalent to the CCJA as a whole, or Article 6 alone. Article 6, enacted alone, would apply only to California tribes as defined in the Article and the State of California.

  Unique to relations between California state courts and tribal courts of California tribes, the proposal would permit transfer of only a portion of the proceedings. For example, a conservator appointed in a state court concerning a conservatee tribal member living in a county containing tribal land could transfer the powers of conservator of the person to the tribal court, while retaining the powers of an estate conservator in the state court. Similarly, the court of a tribe that had adopted Article 6 could transfer the powers of an estate conservator to manage a conservatee's real estate located outside tribal lands to the state court, while maintaining jurisdiction over the conservator of the person of a tribal-member conservatee living in the county where the tribe has tribal land.

A copy of the proposed legislation that would enact Article 6 follows this memorandum, at pages 7 through 12.

Background

Tribal Courts and Populations in California

According to the 2010 Census, 5.2 million U.S. residents reported being American Indian/Alaska Native (AI/AN)-alone or in combination with some other race, and more than 2.9 million reported being AI/AN-alone. Among counties in the United States, Los Angeles County had the highest population of AI/AN-alone in 2000 (76,988). In 2010, California had the largest population of AI/AN-alone (362,801). California represented 12 percent of the total AI/AN-alone population in the United States. California had more than 720,000 AI/AN citizens (alone or in combination with another race) residing in both rural and urban communities. Although California has the largest tribal population in the United States, it has very little tribal land. As of 2005, only 3 percent of California's AI/AN population lived on a reservation or rancheria.

There are currently 110 federally recognized Indian tribes in California and 78 entities petitioning for recognition. Tribes in California currently have nearly 100 separate reservations or rancherias. There are also a number of individual Indian trust allotments. These lands are "Indian Country" as defined under federal law (18 U.S.C. § 1151), and a different jurisdictional scheme applies there. For Indians and Indian Country there are special rules that govern state and local jurisdiction. There may also be federal and tribal laws that apply. As sovereigns, tribes have legal jurisdiction over both their citizens and their lands.

There are estimated to be more than 300 tribal courts in the United States. Many of them appoint adult guardians or conservators. In 2012, 39 of 110 federally recognized California tribes (36 percent) either have a tribal court or access to a tribal court through an inter-tribal court coalition. This is a significant increase from 2002, when only 10 California tribes reported having a tribal court.

At least eight of these court systems, including the Intertribal Court of Southern California, report dealing with cases involving adult guardianship/conservatorship and protection of vulnerable adults. These courts reported that they issue orders concerning their tribal members who live both on and off reservation. They report that to date their orders have been recognized by institutions and agencies both on and off the reservation. In addition, the Northern California Tribal Courts Coalition (NCTCC) reports that protection of vulnerable adults is a priority area that the NCTCC courts have identified for expansion of their services.

Tribal and state jurisdictional issues

As a general matter of federal law, state courts have no jurisdiction to adjudicate guardianship/conservatorship-like proceedings involving Indians in Indian Country. Federal and tribal courts have exclusive jurisdiction over these cases. (See, e.g., *Guardianship of Sasse* (1985) 363 N.W.2d 209.)

In California this jurisdictional scheme is altered due to the civil provisions of Public Law 280 (codified at 28 U.S.C. § 1360) which grants California "jurisdiction over civil causes of action between Indians or to which Indians are parties. . . that arise in [Indian Country] to the same extent that such State has jurisdiction over other civil causes of action. . . ."

There are, however, limits to the application of Public Law 280. Specifically in adjudicating such matters subsection (c) of the law provides:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Subsection (b) of Public Law 280 places the following limitations on the exercise of the state court's jurisdiction:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in

> probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

This means that state courts may be limited in their ability to protect important assets of tribal members. For instance, a state court has no jurisdiction to issue an order concerning the use or occupation of tribal lands or other real or personal property held in trust by the federal government for the benefit of tribes or individual Indians.

Public Law 280 did not divest tribes and tribal courts of any of their jurisdiction; it merely made the exercise of some of that jurisdiction concurrent with the exercise of civil jurisdiction by state courts in disputes between individual Indians or in cases in which individual Indians are parties. Tribes and tribal courts within California maintain the full scope of their jurisdiction over their members and their territory. A tribal court's subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law (*Fisher v. Dist. Ct.* (1976) 424 U.S. 382). Tribes and tribal courts may exercise jurisdiction over tribal members both on and off tribal lands. Under federal and tribal law, tribal jurisdiction over tribal members is not limited to physical presence or residence on tribal trust lands. A tribal court must have both personal and subject matter jurisdiction before it can hear a case, but tribal membership is generally sufficient to grant general personal jurisdiction over an individual wherever the individual resides. Tribes and tribal courts are generally committed to providing tribal members equal access to tribal courts whether they reside on or off the reservation.

Source of this proposal

The proposed Article 6 is the product of a collaborative effort of the Judicial Council's Probate and Mental Health Advisory Committee and the California Tribal Court/State Court Forum.

Attachments

1. Proposed Article 6 of the California Conservatorship Jurisdiction Act pages 7-12.

Article 6 (commencing with Section 2041) of Chapter 8 of Part 3 of Division 4 of the Probate Code would be added, to read:

SEC.1. Article 6 (commencing with Section 2041) of Chapter 8 of Part 3 of Division 4 of the Probate Code is added, to read:

Article 6. Special Provisions Applicable to California State Trial Courts and Tribal Courts of Indian Tribes with Tribal Land Located in the State of California

§ 2041 Definitions

For purposes of this Article,

(a) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their status as Indians, and which administers justice under its inherent authority or the authority of the United States.

(b) "Tribal land" means land that is, with respect to a specific Indian tribe and individual members of that tribe, "Indian country" as defined in 18 U.S.C. § 1151.

(c) "Tribal court" is a unit of an Indian tribal justice system that complies with the requirements of the *Indian Civil Rights Act* (25 U.S.C. § 1302, et seq.), and exercises jurisdiction over proceedings under tribal law and custom that would be identified in the UAGPPJA as adult guardianships and protective proceedings, and in this Code as conservatorships, subject to the limitations provided in Section 1981.

(d) "California tribe" is an Indian tribe with tribal land located in the State of California.

(e) "UAGPPJA" is the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, adopted by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 2007. The California state law version of UAGPPJA is Chapter 8 of Part 3 of Division 4 of this Code, including this Article 6, also known as the California Conservatorship Jurisdiction Act. See Section 1980(b).

(f) "Adopting California tribe" is a California tribe that has adopted the provisions of this Article 6, or provisions that are substantially similar, as stand-alone legislation or tribal government equivalent, or as part of the tribe's adoption of UAGPPJA.

§ 2042 General

(a) All provisions of Articles 1–5 of this Chapter, Sections 1980–2024 of this code, and the uncodified section of the enacting legislation concerning operative dates, apply to California state courts respecting their interactions with tribal courts of California tribes or adopting California tribes as "states" under UAGPPJA, except as modified or otherwise provided in this Article.

(b) Depending on the context, the phrases "other state" and "another state" include a California tribe or, with respect to transfer provisions of Section 2045, an adopting California tribe, as defined in subsections (d) and (f) of Section 2041.

§ 2043 Application of Article 1, General Provisions, to California Tribes and State of California

The following provisions of Article 1 of this Chapter, General Provisions, apply to California tribes and the State of California as specified below:

(a) Section 1981, Limitations on scope of chapter 8, includes tribal court equivalents of listed California state proceedings.

(b) Section 1982, Definitions, are modified or supplemented by the definitions in Section 2041.

(c) Section 1983, International application of chapter, does not apply.

(d) In Sections 1984 and 1985, Communication between courts and Cooperation between courts, the phrase "this state" refers to the State of California, and the phrases "another state" and "that state" refer to California tribes.

(e) In Section 1986, Taking testimony in another state, the phrase "another state" refers to California tribes.

§ 2044 Application of Article 2, Jurisdiction, to California Tribes and State of California

The following provisions of Article 2 of this Chapter, Jurisdiction, define the application to California tribes and adopting California tribes of that article by the courts of the State of California as specified below:

(a) Section 1991, Definitions and significant connection factors, with the following modifications:

(1) "Home state:"

(A) Means a California tribe of which a proposed conservatee is a member if he or she was physically present for the time provided in that section in any county of the State of California within which the tribe has tribal land.

(B) Means the State of California if a proposed conservatee who is a member of a California tribe was physically present for the time provided in that section in a county of the State of California in which his or her tribe does not have tribal land.

(2) "Significant connection state:"

(A) A California tribe is a "significant-connection state" with respect to all situations described in (1) in which it is not a "home state."

(B) The State of California is a "significant-connection state" with respect to all situations described in (1) in which it is not a "home state."

(b) Section 1992, exclusive basis, with the following modification:

Article 2, as modified by this Article 6, provides the exclusive basis for determining whether the court of a California tribe or a California state court has jurisdiction to appoint a conservator of the person, a conservator of the estate, or a conservator of the person and estate, of a member of the tribe.

(c) Section 1993, jurisdiction, with the following modification:

If the proposed conservatee is a member of a California tribe, the phrase "a court of this state," means a tribal court of the tribe or a California state court, depending on where the proposed conservatee was physically present for a qualifying time period provided in Section 1991(a)(2).

(d) Section 1994, special jurisdiction, with the following modification:

The phrase "at the request of the court of the home state" in subdivision (b) refers to the court of a California tribe.

(e) Section 1995, exclusive and continuing jurisdiction, with the following modification:

Exclusive jurisdiction as between a tribal court of an adopting California tribe and a California state court is subject to the authority of such courts to transfer a portion only of jurisdiction between them, as provided in Article 4 as modified by Section 2045.

(f) Section 1996, appropriate forum, with the following modification:

The phrase "court of another state" refers to a tribal court of a California tribe.

(g) Section 1997, jurisdiction declined by reason of conduct, with the following modification:

The phrases "court of another state having jurisdiction," and "court of any other state" refers to a tribal court of a California tribe.

(h) Section 1998, notice of proceeding, with the following modification:

The phrase "home state of the proposed conservatee," refers to a California tribe.

(i) Section 1999, proceedings in more than one state, with the following modification:

The phrases "another state" and "other state" refers to a California tribe.

§ 2045 Application of Article 3, Transfer of Conservatorship, to Adopting California Tribes and State of California

The following provisions of Article 3 of this Chapter, Transfer of Conservatorship, apply to adopting California tribes and the State of California:

(a) Section 2001, Transfer of conservatorship to another state, with the following modifications:

(1) The phrases "another state" and "other state" refers to an adopting California tribe.

(2) A petitioner may request, and the court of this state may order, provisionally and finally, transfer of all or less than all of the authority or powers of the conservator to the tribal court of an adopting California tribe. In the event of a transfer of less than all authority or powers of the conservator, the court of a transferring state shall continue supervision of the administration of the functions or powers not transferred.

(b) Section 2002, Accepting conservatorship transferred from another state, with the following modifications:

(1) The phrases "other state" and "transferring state" refers to an adopting California tribe.

(2) If the proposed transfer is from the tribal court of an adopting California tribe and is of less than all authority or powers of the conservator, the court shall communicate with the tribal court under Section 1984 before it makes an order striking or modifying the powers of the conservator that would change the division of authority or powers made by the order of the tribal court.

§ 2046 Application of Article 4, Registration and Recognition of Orders from Other States

The following provisions of Article 4 of this Chapter, Registration and Recognition of Orders from Other States, apply to California tribes and the State of California:

(a) Sections 2011, Registration of order appointing conservator of person; 2012, Registration of order appointing conservator of estate; and 2013, Registration of order appointing conservator of person and estate, with the following modifications:

(1) The phrases "another state," and "other state," refers to a California tribe.

(2) A conservator of the person, estate, or person and estate appointed in a tribal court of a California tribe for a conservatee who is a member of that tribe may register the appointment in a California state court in an appropriate county under sections 2011, 2012, or 2013, whether or not the tribe has adopted this Article or UAGPPJA.

(3) A conservatorship proceeding filed in a tribal court of a California tribe is not a conservatorship proceeding in this state for purposes of Sections 2011, 2012, and 2013.

(b) Section 2014, Effect of registration; and 2015, Good faith reliance on registration, with the following modifications:

(1) The phrases "another state," refers to a California tribe.

(2) The conservatee under a conservatorship filed in a tribal court of a California tribe who resides in a county within California in which the tribe has tribal land is considered to be residing outside the State of California; the conservator may attest to that fact; and a third person cannot receive actual notice to the contrary because the tribal land of that tribe is within California.

(3) If a conservator appointed by a tribal court of a California tribe for a conservatee who is a member of that tribe, resides within tribal land of that tribe, he or she is not a nonresident of California for purposes of Section 2014, and is not subject to any conditions imposed on nonresident parties.

(c) Section 2016, Recordation of registration documents, with the following modification:

(1) A county recorder of any county of this state may record registrations of tribal court appointment orders of California tribes in California state courts, and a county recorder of a county where tribal land of an adopting California tribe is located may record registrations of California state court appointment orders in that tribe's tribal court.

§ 2047, Application of Article 5, Miscellaneous Provisions

The following provisions of Article 5 of this Chapter, Miscellaneous Provisions, apply to California tribes and the State of California:

(b) Section 2022, Court rules and forms, with the following modification:

The Judicial Council shall develop versions of the registration cover sheet described in Section 2022(b) and the attestation form described in Section 2015(a)(3) suitable for filing in California state courts concerning registration of conservatorship orders from tribal courts of California tribes.

EMAIL FROM NORTHERN CALIFORNIA TRIBAL COURT COALITION (9/15/13)

The Northern California Tribal Court Coalition ("NCTCC") offers this comment in response to the Commission's tentative recommendation regarding California's proposed adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (the "Act"). The NCTCC is a coalition of the tribal courts of five federally-recognized Indian tribes – the Hoopa Valley Tribe, the Karuk Tribe, the Smith River Rancheria, the Trinidad Rancheria, and the Yurok Tribe. These tribes have a combined membership of more than 12,000 tribal citizens.

The NCTCC supports the proposal of the Tribal Court/State Court Forum, dated August 22, 2013. The Forum's proposed addition to the Act is a workable solution to a number of issues which may arise when two sovereigns both potentially have jurisdiction over an adult guardianship proceeding.

We understand that concerns have been expressed about due process protections available in tribal forums. It is true that there are limited remedies available to persons alleging a lack of due process protections in a tribal court proceeding.[1] However, it does not necessarily follow that the due process protections themselves are limited. Both of the tribes in NCTCC that currently issue adult guardianship orders have due process protections built into their respective codes. In general, tribes have a strong interest in providing a fair forum for actions involving their members, since both the tribal governments responsible for enacting laws and the tribal courts responsible for applying them must answer to the tribal membership at election time. While concerns about limited due process in tribal courts are not new, they are not well-founded; a review in 2000 of all individual rights claims in reported tribal court decisions from 1986-1998 found such allegations to be "grossly overstated, if not entirely misplaced."[2] In addition, while Congress did include many constitutional protections in the Indian Civil Rights Act,[3] it chose to omit others for fear of interfering with tribal sovereignty.[4]

It should also be noted that, of the 38 states which have adopted the Act, only two have chosen to exclude tribes from the definition of "state." California has more Indian tribes within its borders than any state except Alaska,[5] and in adopting a number of other uniform laws, it has chosen to include those tribes within the definition of "state."[6] Those uniform acts address subjects wherein due process is every bit as significant a consideration as in the subject of this Act. We are not aware of any systemic problems arising from those inclusions.

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[1] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.
[2] M. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham Law Review 479, 582 (2000).
[3] 25 U.S.C. § 1301 *et seq*.
[4] See generally section 14.04[2] of F. S. Cohen, *Cohen's Handbook of Federal Indian Law*, 2012 edition.
[5] 77 Fed. Reg. 47868.
[6] Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Fam. Code § 6400 *et seq*.); Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code § 3400 *et seq*.); Uniform Interstate Family Support Act (Fam. Code § 4900 *et seq*.); Foreign Country Money Judgment Act (C.C.P. § 1713 *et seq*.); Interstate and International Depositions and Discovery Act (C.C.P. § 2029.100 *et seq*.).